

# ESSENTIAL FISH HABITAT CONSULTATION GUIDANCE

Office of Habitat Conservation  
National Marine Fisheries Service



## **Forward to the November 1999 Version**

The first edition of the Essential Fish Habitat (EFH) Consultation Guidance was issued in March of 1999. This November 1999 version differs from the March version in only one way: the language on page 1.1 under Federal Action Agency Adversely Affect Determinations has been changed to allow National Marine Fisheries Service (NMFS) staff to concur with a Federal agency's "no effect" determination if NMFS staff wish to do so.

In early 2000 another revised version of this guidance will be issued, containing clarifications and additional examples of EFH documents. Some of these additional examples have already been sent to NMFS staff as part of periodic mailings, so the examples in this guidance should not be considered the sole source of information on developing EFH documents.

## **Introduction**

This document describes procedures that have been developed to assist the National Marine Fisheries Service (NMFS) and other Federal agencies in addressing the essential fish habitat (EFH) coordination and consultation requirements established by the 1996 reauthorization of the Magnuson-Stevens Fishery Conservation and Management Act (MSFCMA or Magnuson-Stevens Act) and the Department of Commerce's EFH consultation regulations (50 CFR 600.905 - 930). The statute includes a mandate that Federal agencies must consult with the Secretary of Commerce on all activities, or proposed activities, authorized, funded, or undertaken by the agency, that may adversely affect EFH. This guidance was developed to facilitate the use of existing environmental review procedures as the primary mechanism for EFH consultations, streamline the consultative requirements for activities minimally affecting EFH, and establish a consistent, efficient approach to conducting programmatic and individual consultations.

This guidance does not set absolute criteria for EFH consultation, but does suggest how the EFH consultation requirements should be met by NMFS and Federal action agencies. Regional situations will inevitably result in regional differences in how EFH consultations are conducted. However, the fundamental concept of minimizing duplication while fully complying with the requirements of the MSFCMA, embodied in this guidance, should be applied to all EFH consultations.

Examples of typical EFH documents are included in Appendix 2. These examples should be adapted to meet specific circumstances, and do not represent all possible permutations of the EFH consultation process. NMFS staff developing EFH documents, such as findings, General Concurrences, and programmatic EFH conservation recommendations, should coordinate with the appropriate General Counsels, other regions, and the Office of Habitat Conservation to encourage consistency, where appropriate, and to allow NMFS staff to learn from each other as this new program is implemented.

This guidance will be updated as needed to provide clarification, revisions, or additional information and examples. Revised or new material will be sent to every NMFS staff person who receives a copy of this guidance from the NMFS Office of Habitat Conservation in Silver Spring, Maryland. Anyone providing copies of this guidance to other interested parties should ensure that guidance updates are provided to them also.

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## Executive Summary

### Legislative Mandate:

The consultation requirements of §305(b) of the Magnuson-Stevens Act (16 U.S.C. 1855(b)) provide that:

- Federal agencies must consult with the Secretary on all actions, or proposed actions, authorized, funded, or undertaken by the agency, that may adversely affect EFH;
- the Secretary shall provide recommendations (which may include measures to avoid, minimize, mitigate, or otherwise offset adverse effects on EFH) to conserve EFH to Federal or state agencies for activities that would adversely affect EFH. *[The consultation requirements of the Magnuson-Stevens Act differ for Federal and state agencies: only Federal agencies have a mandatory statutory requirement to consult with NMFS; as noted above, they must consult on all actions that may adversely affect EFH. However, NMFS must provide EFH conservation recommendations to state agencies if NMFS receives information about a state activity that would adversely affect EFH. Each NMFS Region should establish procedures for identifying actions or proposed actions authorized, funded, or undertaken by state agencies that would adversely affect EFH, and for identifying the most appropriate method for providing EFH conservation recommendations to the state agency.];*
- the Federal action agency must provide a detailed response in writing to NMFS and the appropriate Council within 30 days after receiving an EFH conservation recommendation (or at least 10 days prior to final approval of the action, if a decision by the Federal agency is required in less than 30 days) *[The response must include a description of measures proposed by the agency for avoiding, mitigating, or offsetting the impact of the activity on EFH. In the case of a response that is inconsistent with the recommendations of NMFS, the Federal action agency must explain its reasons for not following the recommendations, including the scientific justification for any disagreements with NMFS over the anticipated effects of the proposed action and the measures needed to avoid, minimize, mitigate, or offset such effects. State agencies are not required to respond to EFH conservation recommendations.]*

## EFH Regulations

Regulations for implementing the EFH coordination and consultation provisions of the MSFCMA are at 50 CFR 600.905 - 930. These regulations provide definitions, procedures for using existing consultation processes, procedures for conducting individual EFH consultation when an existing process is not available, and alternatives to individual EFH consultation. The EFH regulations also address coordination with the Fishery Management Councils, NMFS EFH conservation recommendations to Federal and state agencies, and Council comments and recommendations to Federal and state agencies. These regulations are NMFS's provide required procedures for NMFS and Federal agencies to meet the EFH consultation statutory requirements. Thus, much of the information in this consultation guidance is additional explanation of the EFH regulations.

## Options for Meeting EFH Consultation Requirements

NMFS has defined five approaches to meet the EFH consultation requirements: use of existing procedures, general concurrences, programmatic consultations, abbreviated consultation, and expanded consultations.

**Use of Existing Procedures.** Consultation and coordination under the Magnuson-Stevens Act should be consolidated with interagency coordination procedures required by other statutes, such as the National Environmental Policy Act, Fish and Wildlife Coordination Act, Endangered Species Act, and Federal Power Act, to reduce duplication and improve efficiency. The use of existing environmental coordination and/or review procedures to meet the EFH consultation requirements is the preferred approach for EFH consultations. For NMFS and a Federal action agency to use an existing process for EFH consultation, NMFS must make a finding that the existing process fulfills the requirements of the MSFCMA and EFH regulations.

**General Concurrence.** A general concurrence identifies specific types of Federal actions that may adversely affect EFH, but for which no further consultation will generally be required. In order to issue a general concurrence, NMFS must determine, after coordinating with the appropriate Fishery Management Council(s) and reviewing public comment, that the actions are 1) similar in nature and similar in their impact on EFH, 2) do not cause greater than minimal adverse effects on EFH when implemented individually, and 3) do not cause greater than minimal cumulative adverse effects on EFH. General concurrences may be national or regional in scope.

A Federal agency may request a General Concurrence for a category of its actions by providing NMFS with a written description of the nature and approximate number (annually or by some other appropriate time frame) of the proposed actions, an analysis of the effects of the actions on EFH and associated species and their life history stages, including cumulative effects, and the Federal agency's conclusions regarding the magnitude of such effects. NMFS may also initiate development of a General Concurrence. If NMFS, after coordinating with the appropriate Fishery

Management Council(s), determines that a General Concurrence is appropriate, it will provide the Federal agency with a written statement that further consultation is not required for activities specified in the General Concurrence.

**Programmatic Consultations.** A programmatic consultation allows NMFS and a Federal action agency to consult on, and NMFS to provide EFH conservation recommendations for, a potentially large number of individual actions that may adversely affect EFH. Programmatic consultation will generally be the most appropriate option to address funding programs, large-scale planning efforts, and other instances when a Federal agency or NMFS want to evaluate the effects on EFH of an entire program or parts of a program. Programmatic consultation should be used to develop programmatic EFH conservation recommendations. A programmatic consultation may also be used as a screening process to determine which program actions qualify for a General Concurrence, which actions do not require any EFH consultation, which actions can be addressed with programmatic EFH conservation recommendations and, for those actions that do require individual EFH consultation, what process should be used to most efficiently accomplish EFH consultation.

A Federal agency may request programmatic consultation by providing NMFS with a written description of the program, including the nature and approximate number (annually or by some other appropriate time frame) of the actions, an analysis of the effects of the actions on EFH and associated species and their life history stages, including cumulative effects, and the Federal agency's conclusions regarding the magnitude of such effects. NMFS may also initiate a programmatic consultation by requesting such information from the agency. It is important that NMFS work with the Federal action agency in determining the extent of the activities covered by a programmatic consultation. In many cases it may be beneficial for NMFS to involve the Federal agency in developing the programmatic EFH conservation recommendations.

Because effects on EFH will often depend on exact location or design information, programmatic consultation may not obviate the need for individual consultation on actions in the program. However, programmatic EFH conservation recommendations can give an agency early and consistent guidance on NMFS concerns and proposed solutions. The appropriate level for programmatic consultation will depend on the level at which the program is developed, which may be at either headquarters or the regions.

### **Expanded and Abbreviated Consultation**

When no other methods can be used for EFH consultation, Federal agencies must use the abbreviated and expanded consultation processes outlined in the EFH regulations at 50 CFR 600.920. These processes include notification to NMFS of actions that may adversely affect EFH, preparation of an EFH Assessment, and development of EFH conservation recommendations. They can be used by any Federal agency to conduct EFH consultation with NMFS on actions that may adversely affect EFH.

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## Definitions<sup>1</sup>

**Adverse effect** - any impact which reduces the quality and/or quantity of essential fish habitat. Adverse effects may include direct (e.g., contamination or physical disruption), indirect (e.g., loss of prey, or reduction in species' fecundity), site-specific or habitat-wide impacts, including individual, cumulative, or synergistic consequences of actions. (50 CFR 600.810)

**Essential fish habitat (EFH)** - those waters and substrate necessary to fish for spawning, breeding, feeding, or growth to maturity. For the purpose of interpreting the definition of essential fish habitat: "Waters" include aquatic areas and their associated physical, chemical, and biological properties that are used by fish and may include aquatic areas historically used by fish where appropriate; "substrate" includes sediment, hard bottom, structures underlying the waters, and associated biological communities; "necessary" means the habitat required to support a sustainable fishery and the managed species' contribution to a healthy ecosystem; and "spawning, breeding, feeding, or growth to maturity" covers a species' full life cycle. EFH is described by Fishery Management Councils (Council) in amendments to Fishery Management Plans, and is approved by the Secretary of Commerce acting through the National Marine Fisheries Service (NMFS). (50 CFR 600.10)

**EFH Assessment** - an analysis of the effects of a proposed action on EFH. Mandatory contents are: a description of the proposed action; an analysis of the effects of that action on EFH; the Federal action agency's views on those effects; and proposed mitigation, if applicable. Additional information that should be included (if appropriate): the results of on-site inspections; the views of recognized experts on affected habitat or fish species; a review of pertinent literature; and an alternatives analysis. (50 CFR 600.920 (g))

**EFH conservation recommendation** - a recommendation provided by NMFS to a Federal or state agency pursuant to section 305(b)(4)(A) of the Magnuson-Stevens Act regarding measures that can be taken by that agency to conserve EFH. EFH conservation recommendations may be provided as part of an EFH consultation with a Federal agency, or may be provided by NMFS to any Federal or state agency whose actions would adversely affect EFH.

**EFH consultation** - the process of satisfying the Federal agency consultation and response requirements of section 305(b)(2) and 305(b)(4)(B) of the Magnuson-Stevens Act, and the EFH conservation recommendation requirement of section 305(b)(4)(A) of that Act. When completed, an EFH consultation generally consists of: 1) notification to NMFS of a Federal action that may adversely affect EFH, 2) an EFH assessment provided to NMFS, 3) EFH conservation recommendations provided by NMFS to the Federal action agency, and 4) the Federal agency's response to NMFS's EFH conservation recommendations.

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<sup>1</sup>Unless so noted, these definitions are not quotes from statute or regulation.

**Federal action** - any action authorized, funded, or undertaken, or proposed to be authorized, funded, or undertaken by a Federal agency. (50 CFR 600.810 and 16 U.S.C. 1855(b)(2))

**Finding** - a determination by NMFS that an existing or modified consultation/coordination process satisfies the Federal agency consultation requirements of section 305 of the Magnuson-Stevens Act.

## **1.0 Effect Determinations and Consultation**

### **Federal Action Agency Adversely Affect Determinations**

The trigger for an EFH consultation is a Federal action agency's determination that an action or proposed action, funded, authorized or undertaken by that agency may adversely affect EFH. If a Federal agency makes such a determination, then EFH consultation is required.

If a Federal action agency determines that an action does not meet the may adversely affect EFH test (i.e., the action will not adversely affect EFH), no consultation is required. The Federal action agency is not required to contact NMFS about their determination, and should not be encouraged to do so. A "no effect on EFH" letter is not required or even addressed by either the statute or the EFH regulations. If an agency does send NMFS a "no effect on EFH" letter, NMFS may elect to respond in writing at NMFS' discretion, but a letter of concurrence from NMFS is not required.

If, as a result of an agency's request for concurrence, NMFS becomes aware of potential adverse effects on EFH, NMFS should so inform the Federal action agency and proceed as described in the following section.

### **NMFS Adversely Affect Determinations**

If NMFS receives information regarding a Federal action agency action that *may adversely affect EFH*, but the action agency has not initiated EFH consultation, NMFS may inform the action agency of their need to consult with NMFS on actions that may adversely affect EFH, to fulfill their statutory obligations under MSFCMA. If the action agency has determined that their action will not adversely affect EFH, but NMFS disagrees, NMFS may ask the Federal agency to initiate EFH consultation so that NMFS will have appropriate information (the EFH Assessment) to develop EFH conservation recommendations. However, the Federal agency is not required to agree to NMFS' request. If NMFS believes that a Federal agency action would adversely affect EFH, NMFS is required by the MSFCMA to provide EFH conservation recommendations regardless of whether the Federal agency has initiated EFH consultation. The Federal action agency is required to respond to these recommendations in writing regardless of whether the action agency initiated consultation.

### **Consultation Initiation and Completion**

An EFH consultation is generally initiated when notification and an EFH Assessment is provided to NMFS for a Federal action that may adversely affect EFH, although agencies may (and should be encouraged to) discuss EFH concerns in pre-application planning and other early phases of project development. An EFH consultation generally is concluded when a Federal agency

provides a response to NMFS's EFH conservation recommendations. However, in the case of Programmatic Consultations and General Concurrences, additional consultation for specific types of activities may be required after an agency responds to EFH conservation recommendations.

Furthermore, the EFH regulations allow the NMFS Assistant Administrator to request further review of Federal action agency decisions that are contrary to NMFS recommendations (50 CFR 600.920(j)(2)). For Federal action agency decisions that are made in less than 30 days, the EFH regulations specify that the action agency's response to NMFS EFH conservation recommendations must be provided to NMFS at least 10 days before final action on the project (50 CFR 600.920(j)(1)), to allow for further review, if required. Although the EFH regulations do not specify this 10-day time period for projects authorized after more than 30 days, in practice a minimum 10-day window should be allowed between the action agency's response to NMFS and final action on the project, so that NMFS has the time to request further review, if needed.

Finally, supplemental consultation is required if the action agency substantially revises a proposed action such adverse effects that on EFH are changed, or if new information becomes available that affects the basis for NMFS' EFH conservation recommendations (50 CFR 600.920(k)).

## **2.0 Use of Existing Procedures for EFH Consultation**

### **Background**

The MSFCMA requires Federal agencies to consult with NMFS on actions that may adversely affect EFH, and to respond within 30 days to any EFH conservation recommendations provided by NMFS or the Councils. The EFH consultation regulations state that existing procedures should be used to the greatest extent possible (50 CFR 600.920(e)). Criteria for using existing procedures include: NMFS making a finding that the existing process will satisfy the MSFCMA requirements; and the Federal agency providing timely notification (sufficient to develop EFH conservation recommendations) and an assessment of the impacts on EFH.

There are four essential elements of EFH consultation:

- 1) the Federal agency provides to NMFS notification of an activity that may adversely affect EFH
- 2) the Federal agency provides to NMFS an assessment of effects on EFH with notification
- 3) NMFS provides to the Federal agency EFH conservation recommendations
- 4) the Federal agency provides to NMFS a detailed written response, within 30 days of receiving NMFS EFH conservation recommendations (at least 10 days before final approval of the action for decisions that are rendered in fewer than 30 days).

Many existing procedures have elements 1-3, and a few have 1-4. Following are descriptions of the four most commonly used existing procedures for coordination between NMFS and other Federal agencies on activities in aquatic habitat, and how those procedures can be used for EFH consultation. Most require some slight modification or additions to comply with the Act and the EFH regulations.

In many cases, a Federal activity requiring consultation will be subject to more than one existing consultation process (e.g., ESA section 7 consultation as well as NEPA). In this instance, NMFS and the Federal action agency must decide at the regional level which existing process to use to accomplish EFH consultation. The process chosen should be the one that provides the most efficient and effective coordination with the Federal agency.

### **Developing a Finding**

NMFS must issue a finding before an existing environmental review process may serve as the means for EFH consultation. Either NMFS or a Federal agency may initiate discussions on using an existing procedure to accomplish EFH consultation. After discussions between NMFS and Federal agency staff about the Federal agency's existing process and the EFH consultation requirements, the two agencies should agree on how to fulfill the requirements of EFH

consultation using the existing process. At this point, the Federal agency could write a letter requesting that NMFS make a finding that the existing process can be used to meet the EFH consultation requirements. NMFS would respond with a letter that details how the existing process will be used for EFH consultation. Alternatively, NMFS could send the Federal action agency a letter detailing how the two agencies have agreed to use an existing procedure for EFH consultation, and the Federal agency respond in writing, confirming that agreement. A finding should include four essential elements: 1) how the action agency will notify NMFS of projects with the potential to adversely affect EFH, 2) how the EFH Assessment will be provided, 3) how NMFS will provide EFH conservation recommendations, 4) how the action agency will respond to those comments. Sample findings are included in Appendix 2.

For instances where NMFS does not find that an agency's existing process will meet EFH consultation requirements, NMFS should respond with a letter containing language similar to that in Appendix 2.

Because many existing processes are implemented somewhat differently in different regions, the most appropriate level for developing a finding will usually be in the NMFS regions. However, there may be instances when NMFS HQ will develop a finding, with input from the regions.

### Most Commonly-Used Existing Processes

#### **National Environmental Policy Act:**

##### The EIS process:

1) **Notification** - Notification to NMFS occurs when NMFS, through NOAA, receives a draft EIS. The action agency should clearly state in the draft EIS that the NEPA process is being used for EFH consultation. Informally, the scoping process will often provide early notification before the draft EIS is prepared.

2) **EFH Assessment** - Impact on EFH should be addressed in the draft EIS, in a chapter or section titled "EFH" or something similar enough so that a reader can identify the EFH information from the table of contents. This section may reference pertinent information in the Affected Environment and Environmental Consequences chapters. The information should include both an identification of affected EFH and an assessment of impacts.

3) **EFH conservation recommendations** - NMFS provides EFH conservation recommendations as part of NOAA's comments on the draft EIS, in a separate section of NOAA's comment letter called "EFH Conservation Recommendations". Under existing NOAA procedures, EIS comments are normally provided to NOAA for forwarding to the

Federal agency, but may also be provided directly to the Federal agency by NMFS at the same time.

4) **Agency response** - Within 30 days of receiving NMFS' recommendations, the Federal agency sends a preliminary response stating that the agency has received NMFS' EFH conservation recommendations, will consider them fully, has not yet made a decision on the project, but will respond to NMFS' EFH recommendations fully when the agency has made a decision in approximately ## days. The agency then responds fully in the final EIS, in a section or chapter clearly labeled as such. If the final EIS comes out within 30 days of the agency receiving the NMFS recommendations, the preliminary letter is not needed. Under NEPA regulations, the Record of Decision (ROD) cannot be signed until 30 days after the final EIS goes out, so NMFS will have time to request further review, if necessary.

#### The EA Process:

1) **Notification** - Notification to NMFS occurs when NMFS receives a draft EA. It should be clearly stated in the EA or transmittal letter that the agency is initiating EFH consultation. Many agencies do not normally circulate draft EAs for comment, but if the agency wants to use the EA process for EFH consultation, they must give NMFS a draft EA and delay signing a Finding of No Significant Impact (FONSI) until after the agency responds to NMFS EFH recommendations. If an agency does not wish to provide a draft EA to NMFS, they may use some other process for EFH consultation.

2) **EFH Assessment** - Impact on EFH should be addressed in the EA, in either a chapter titled "EFH" or in a section on environmental impacts. This section may reference pertinent information in other sections. The information must be clearly labeled as the information required in an EFH Assessment and should include both an identification of affected EFH and an assessment of impacts.

3) **EFH conservation recommendations** - NMFS provides EFH conservation recommendations as part of NMFS comments on the EA, in a separate section of NMFS' comment letter called "EFH Conservation Recommendations". Under existing NOAA procedures, EA comments are normally provided from NMFS directly to the Federal agency.

4) **Agency response** - Within 30 days of receiving NMFS' recommendations, the Federal agency sends a preliminary response stating that the agency has received NMFS's EFH conservation recommendations, will consider them fully, has not yet made a decision on the project, but will respond to NMFS's EFH conservation recommendations fully when a decision has been made, in approximately ## days. The agency then responds fully in a detailed letter provided to NMFS at least 10 days before the agency signs a FONSI. If the

agency makes a decision within 30 days of receiving NMFS recommendations, the preliminary letter is not necessary.

## **Endangered Species Act**

Consultation under the Endangered Species Act (ESA) should be coordinated with EFH consultation so that the two processes proceed concurrently to the extent appropriate (considering the species involved). One process should not be subsumed in the other; rather they should proceed in parallel. When combined consultation is necessary because the species affected is both managed under the MSFCMA and listed under the ESA, information required of the Federal agency and recommendations developed by NMFS should be very similar for the two consultation processes. In cases where combined consultation is necessary because an action will affect a listed species and a different managed species, consultation should be coordinated, but information requirements and recommendations may differ (but should not conflict). In the latter case, issues may be resolved for the listed species, but not the managed species, or vice-versa, in which case one consultation process would come to completion while the other continues. Good communication between the Habitat Conservation (HC) and Protected Resources (PR) Divisions with NMFS regions is essential to facilitating parallel ESA and EFH consultation. Any conflicts between ESA recommendations and EFH recommendations must be resolved within NMFS before being sent to the Federal agency.

NMFS takes several types of internal actions related to ESA, including approving Habitat Conservation Plans, issuing section 10 incidental take permits, and developing Recovery Plans. If any of these actions may have an adverse effect on EFH, an EFH consultation will be required. These consultations may require developing new internal procedures.

### Early Coordination:

ESA consultation often involves discussions with Federal agencies at very early stages in the project planning process. Many times, issues related to adverse effects on listed species can be resolved through early coordination. When managed species may be adversely affected by the proposed action, EFH issues should be discussed in addition to the ESA concerns. When an agency requests information on the presence of EFH in a particular location, that agency should be informed of the presence of listed species or critical habitat, if applicable, and vice-versa. NMFS regions may wish to develop joint information packages to address both ESA and EFH resources.

### Informal consultation:

Informal consultation occurs more frequently than formal consultation under ESA. Through informal consultation, projects that would have an adverse effect as proposed can be altered to avoid adverse effects on listed species or critical habitat. A determination to conduct an EFH



consultation does not automatically trigger the need to conduct an ESA section 7 formal consultation. The threshold for an EFH consultation is "may adversely affect," whereas the threshold for a formal section 7 consultation is "likely to adversely affect." A formal section 7 consultation should be conducted only when it is determined that the Federal action is likely to adversely affect a listed species. In those cases, EFH consultation can be conducted together with the formal consultation process (see next section).

Informal consultation processes vary among NMFS regions, so use of these processes for EFH consultation may also vary. As an example, the NMFS Northeast Region has a standard informal ESA consultation process that could be used for EFH consultation:

- 1) **Notification** - Notification could occur when the Federal agency sends a Biological Assessment (BA) or a letter requesting ESA consultation. It could also occur earlier, when an agency requests a list of threatened or endangered species. The agency should clearly state that it is consulting pursuant to the EFH provisions of the MSFCMA.
- 2) **EFH Assessment** - An EFH Assessment could be included in the BA or the letter that explains the proposed action and its effects. The BA must have a separate section on EFH or point out where the EFH Assessment information is included.
- 3) **EFH conservation recommendations** - EFH recommendations could be included in the letter from NMFS saying that either the project is not likely to adversely affect listed species, or that it is likely to adversely affect listed species and formal consultation is needed. General habitat concerns are generally included in this letter; the EFH recommendations would have to be clearly labeled as such.
- 4) **Agency response** - Within 30 days of receiving NMFS' recommendations, the Federal agency sends a preliminary response stating that the agency has received NMFS' EFH conservation recommendations, will consider them fully, has not yet made a decision on the project, but will respond to NMFS' EFH conservation recommendations fully when a decision is made, in approximately ## days. The agency then responds fully in a detailed letter provided to NMFS at least 10 days before final approval of the action. If the agency makes a decision within 30 days of the agency receiving the NMFS recommendations, the preliminary letter is not needed.

#### Formal consultation:

In three of the five NMFS regions, ESA formal consultation is currently finalized by the NMFS HQ Protected Resources Office, rather than in the region. However, since all Biological Opinions (BOs) (including those finalized at HQ) are currently drafted in the Regions, there is an opportunity to combine EFH consultation and ESA formal consultations:

- 1) **Notification** - Notification occurs when the agency provides a BA, or when the agency requests consultation. The agency should clearly state that it is consulting pursuant to the EFH provisions of the MSFCMA.
- 2) **EFH Assessment** - An assessment of impact on EFH should be included in the BA or in the information required to initiate formal ESA consultation, in a separate section entitled "EFH." Distinctions between ESA "critical habitat" and EFH should be clear.
- 3) **EFH conservation recommendations** - EFH recommendations should be sent to the Federal agency along with the BO, but they should be kept separate (i.e., NMFS could send a two-part document with the BO in part 1 and the EFH recommendations in part 2). Distinctions between reasonable and prudent measures, or other ESA components of the BO, and EFH recommendations should be made clear. In particular, EFH conservation recommendations should not be confused with conservation recommendations made under section 7(a)(1) of ESA.
- 4) **Agency response** - Within 30 days of receiving NMFS' EFH conservation recommendations, the Federal agency sends a preliminary response stating that the agency has received NMFS' recommendations, will consider them fully, has not yet made a decision on the project, but will respond to NMFS' EFH conservation recommendations fully when a decision is made, in approximately ## days. The agency then responds fully in a detailed letter provided to NMFS 10 at least days before final approval of the action. If the agency makes a decision within 30 days of the agency receiving the NMFS recommendations, the preliminary letter is not needed.

#### Section 10 Permits:

Section 10(a)(1)(A) permits are issued to Federal and non-Federal entities by NMFS for activities involving take of listed species otherwise prohibited by section 9 if such taking is for scientific purposes or to enhance the propagation or survival of the affected species, including, but not limited to, acts necessary for the establishment and maintenance of experimental populations. Section 10(a)(1)(B) permits are issued to non-Federal entities for any other activities involving take of listed species otherwise prohibited by section 9 if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity. NMFS' issuance of both a section 10(a)(1)(A) and section 10(a)(1)(B) permit are Federal actions subject to section 7 of the ESA and NEPA. However, NMFS's issuance of section 10(a)(1)(A) permits for activities other than hatcheries are categorically excluded under NOAA's NEPA implementing regulations. At present, all section 10(a)(1)(A) permits and non-salmonid section 10(a)(1)(B) permits are issued from NMFS HQ.

Section 10(a)(2)(A) requires applicants for a section 10(a)(1)(B) incidental take permit to submit a "conservation plan" - referred to as a Habitat Conservation Plan or HCP. NMFS approves HCPs

in a process that involves both NEPA and the ESA section 7 consultation process. Ideally, Essential Fish Habitat concerns for listed and non-listed species should be identified during the HCP development phase when the applicant's proposed activity is being integrated with listed species protection needs and early section 7 consultation is in progress. This phase is typically conducted by the applicant with technical assistance from NMFS and ends when a "complete application package" is submitted. If the applicant does not agree to include non-listed species in the HCP, non-listed species must still be addressed in NMFS's NEPA analysis supporting issuance of the section 10 permit.

Since EFH Consultations are NMFS's responsibility (not the applicant's), and both listed and non-listed species may be involved, conservation measures should be submitted during the NEPA public comment period, rather than waiting for the section 7 consultation process to conclude. If NMFS EFH recommendations for species that are also listed under the ESA are adopted and incorporated into the proposed action for which an ESA section 7 consultation is performed, those recommendations may be enforced through ESA in that any deviation from them would trigger re-initiation of ESA consultation. To comply with the response requirement of the MSFCMA, NMFS should respond to the record at least 10 days before issuance of the section 10 permit.

#### Recovery Plans:

Recovery Plans for listed species are sent out for public comment in a draft form and then finalized. Although EFH consultation could occur during the public comment period, coordination between regional PR and HC staff during development of the draft Recovery Plan is preferable. If PR staff determine that the Recovery Plan may have an adverse effect on EFH, a preliminary draft of the Recovery Plan should be sent to HC staff, along with the information required for an EFH Assessment. HC staff should then provide EFH recommendations on the preliminary draft, to which PR should respond.

### **Fish and Wildlife Coordination Act/Clean Water Act/Rivers and Harbors Act**

#### Individual Permits:

Many of NMFS's concerns with respect to fish habitat are currently addressed through commenting, pursuant to the Fish and Wildlife Coordination Act, on Clean Water Act (CWA) section 404 / Rivers and Harbors Act (RHA) section 10 permits issued by the Army Corps of Engineers<sup>2</sup> (ACOE). Although this process includes most of the essential elements of EFH consultation, the ACOE public notices generally contain little or no information on the impacts

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<sup>2</sup> In some NMFS regions, the same process is used for projects authorized under section 103 of the Marine Protection, Research, and Sanctuaries Act.

of the proposed activity because ACOE staff rely on agency input and public comment to develop that information. Therefore, to use the existing FWCA/CWA/RHA process for EFH consultation, NMFS staff must meet with ACOE staff to discuss the information needs of EFH consultation. In discussions at the District/region level, the ACOE and NMFS should discuss the information needs for EFH Assessments, and the project types likely to require expanded consultation (i.e., substantial adverse effects on EFH). It is recommended that for those projects requiring only abbreviated consultation, the public notice should include brief information on EFH and impacts. For those projects requiring expanded consultation, the ACOE should provide NMFS with a more detailed EFH Assessment.

Just as the ACOE makes the initial determination of whether or not a proposed project “may adversely affect” EFH, the ACOE should also make the initial determination of whether abbreviated or expanded consultation is appropriate. However, if NMFS believes that expanded consultation is required for a particular project, NMFS should inform the ACOE of this conclusion at the earliest opportunity. The process for using the ACOE public notice process for CWA/RHA permits to conduct EFH consultation is:

1) **Notification** - Notification occurs when NMFS receives a public notice from the ACOE on the project.

2) **EFH Assessment** -

a) For those projects that require abbreviated consultation, the ACOE will put a brief EFH Assessment in the public notice (e.g., “This project will fill 5.3 acres of EFH for juvenile summer flounder. Loss of this nursery habitat may adversely affect summer flounder, but the ACOE has made a preliminary determination that the adverse effect on EFH will not be substantial.”)

b) For those projects that the ACOE determines require expanded consultation, the ACOE will provide NMFS with a detailed EFH Assessment. This Assessment may be a separate document or it may be a component of another document, such as a draft Statement of Findings (SOF) or draft EA, as long as the EFH Assessment is clearly identified. The EFH Assessment will be provided to NMFS in a time frame sufficient to allow NMFS to develop EFH conservation recommendations (generally 30 days, but more or less time may be needed depending on the complexity of the project).

c) If, upon receiving a public notice (or in pre-application consultation), NMFS concludes that a project has the potential for substantial adverse impacts on EFH, NMFS will so inform the ACOE and request that the ACOE conduct expanded EFH consultation and provide a detailed EFH Assessment. This request may occur after ACOE has initiated abbreviated EFH consultation, or before any EFH consultation has occurred. If a public comment period for the project has already begun, NMFS may request an extension of the comment period (under Part II. 4 of the 404(q) MOA with

Army) to allow time for the ACOE to provide the EFH Assessment, and for NMFS to develop EFH conservation recommendations. If the ACOE does not agree to conduct expanded consultation, NMFS will provide EFH conservation recommendations based on whatever information has been provided.

3) **EFH Conservation Recommendations** - NMFS provides EFH conservation recommendations as NMFS comments on the public notice, clearly labeled as such.

4) **Response** - The ACOE responds to NMFS EFH conservation recommendations in either a letter or a revised SOF or EA, at least 10 days before the permit is issued. If the ACOE will not be making a decision within 30 days of receiving NMFS recommendations, the ACOE sends a preliminary response within 30 days stating that the ACOE has received NMFS's EFH recommendations, will consider them fully, has not yet made a decision on the project, but will respond to NMFS EFH recommendations fully when a decision is made in approximately ## days.

#### General Permits (State Programmatic, Regional, or Nationwide)

General permits usually authorize, after very short comment periods, actions that should have minimal adverse impact, both individually and cumulatively. In some cases a General Concurrence or Programmatic Consultation is appropriate for actions authorized by those permits. In other cases, abbreviated consultation might be appropriate, particularly with state programmatic general permits, if the ACOE and NMFS can agree on acceptable time frames. In that case, the process would be similar to that for individual permits.

### **Federal Power Act**

#### Traditional Licensing Process:

When FERC uses its traditional (re)licensing procedures, it usually takes approximately three years for the applicant to work with NMFS and other interested entities on gathering information and conducting studies needed for NMFS to develop its Federal Power Act (FPA) section 10(j) recommendations for fish protection, mitigation, and enhancement and section 18 fishway prescriptions. At the end of this time, the applicant submits its application to FERC for a new license. The application includes an Exhibit E containing environmental information about the project. Once the application is complete, FERC issues a public notice that the application is ready for environmental analysis (REA). NMFS then has 60 days to submit its recommendations and prescriptions. FERC includes NMFS's recommendations and prescriptions in its NEPA analysis. FERC's final license decision is issued after the NEPA document is finalized and takes the form of a FERC order.

Steps for adding EFH consultation to FERC's existing process:

1. **Notification** - Notification to NMFS would occur at the time FERC issues an REA notice. The notice should include a statement that FERC is initiating EFH consultation.
2. **EFH Assessment** - Most of the information needed for an EFH Assessment would be included in the applicant's Exhibit E and should be identified in a distinct "EFH" section of Exhibit E. FERC should specifically state in their notice that this is the EFH Assessment and reference appropriate material in Exhibit E. FERC needs to ensure that Exhibit E does contain all the necessary information and if not, provide supplemental information to NMFS. FERC must also ensure that NMFS receives the EFH Assessment in a timely fashion.
3. **EFH conservation recommendations** - NMFS will provide EFH conservation recommendations along with section 10(j) recommendations and section 18 fishway prescriptions. NMFS should clearly label the EFH recommendations as such and be sure to distinguish them from the 10(j) recommendations and section 18 prescriptions. If they are the same, then NMFS should say that explicitly.
4. **Agency response** - FERC responds to NMFS EFH recommendations in a detailed letter during the section 10(j) coordination process or in a separate letter at least 10 days before they issue the order. Since FERC ordinarily will not make a decision within 30 days of receiving NMFS recommendations, FERC should send a preliminary response within 30 days stating that they have received our recommendations, will consider them fully, have not yet made a decision on the project, but will respond to our recommendations fully when they have made a decision in ## days. According to FERC's regulations, parties have 30 days to appeal a license order by requesting rehearing. NMFS could include an appeal of FERC's treatment of our EFH recommendations, if warranted.

Alternative Procedures (also known as "applicant prepared EA" or "the collaborative process")

FERC recently revised its regulations governing applications for licenses and exemptions to offer an alternative process whereby the pre-filing consultation process and environmental review process are combined. This process involves formation of a group of interested participants, typically made up of FERC, Federal and state resource agencies, Indian tribes, the public, and the applicant. This group operates on a consensus basis and works together to scope the issues, determine necessary studies, evaluate the information, and develop the draft NEPA document. This document replaces Exhibit E in the application and FERC does not issue an REA notice. NMFS submits its preliminary recommendations and prescriptions during the alternative process.

Steps for adding EFH consultation to FERC's alternative process:

1. FERC will notify NMFS once FERC has enough information to be able to describe the project, effects on the managed species and its EFH, and mitigation. This will be done

near the end of the alternative process, but before, or concurrent with, NMFS's requirement to provide preliminary 10(j) recommendations and prescriptions.

2. - 4. The steps are the same as for the traditional licensing process.

### **3.0 Programmatic EFH Consultations**

#### **Background**

Under section 305(b)(2) of the MSFCMA, Federal agencies are required to consult with the Secretary of Commerce on any action that may adversely affect essential fish habitat (EFH). Given the national scope of EFH, and the numerous threats to EFH, the Federal actions that will trigger EFH consultation encompass a wide range of programs and agencies.

Use of programmatic consultations is a mechanism for implementing the EFH consultation requirements efficiently and effectively by including many individual actions that may adversely affect EFH in one consultation. Section 600.920(a)(2) of the EFH regulations describes programmatic consultation as appropriate if sufficient information is available at a programmatic level to develop EFH conservation recommendations that will address all reasonably foreseeable adverse impacts to EFH.

Programmatic consultations allow NMFS and other Federal agencies to take a broad, comprehensive look at Federal programs, their potential or actual adverse effects on EFH, and appropriate conservation recommendations. Some examples of programs that would likely be appropriate for a programmatic EFH consultation are: funding programs, such as grants by Federal agencies to states to carry out activities that could adversely affect EFH; U.S. Forest Service forest plans; and Minerals Management Service regional 5-year plans. The goal of a programmatic consultation should be to address as many adverse effects as possible through programmatic EFH conservation recommendations. Thus, a programmatic consultation results in a letter from NMFS to the Federal agency containing programmatic EFH conservation recommendations, as well as identification of any adverse impacts that could not be addressed by the programmatic EFH conservation recommendations (additional components of a programmatic consultation letter are addressed below). Any adverse effect that cannot be addressed through programmatic EFH conservation recommendations will have to be addressed through individual consultation (preferably by using existing procedures) or a General Concurrence.

Programmatic consultations may occur at a headquarters or regional level. It is essential that offices conducting programmatic consultations inform other NMFS offices (i.e., Habitat Divisions in other regions and at Headquarters) that these consultations are occurring, in case the results of the programmatic consultation could affect other regions or national policy.

#### **Program Size**

Any size program may be addressed through a programmatic consultation, depending on the nature of the actions conducted in the program. Whether a particular program should be



subdivided, or whether some programs should be lumped together for the consultation, should be determined jointly by NMFS and the Federal action agency, keeping in mind the goal of developing programmatic EFH conservation recommendations. Priority should be given to those programs or actions within programs for which programmatic conservation recommendations are most appropriate, e.g., for which a substantial portion of the adverse effects can be addressed with programmatic EFH conservation recommendations, without information on a specific site or project. If a substantial number of the agency's actions would require additional EFH conservation recommendations on a case-by-case basis, the programmatic consultation should be restricted to those actions for which programmatic EFH conservation recommendations are appropriate.

All actions that are part of the program (or specific part of a program) should be addressed in the consultation, including reasonably foreseeable but unplanned actions (e.g., oil spills or other accidental discharges) and actions that are authorized but may not be reported to the action agency (e.g., non-reporting activities covered by general permits).

### Process

A programmatic consultation may be initiated by a Federal action agency or by NMFS, on any Federal program that will require EFH consultation, and for which either agency thinks programmatic consultation might be the best manner of accomplishing that consultation. To initiate programmatic consultation, the Federal agency should send NMFS an EFH Assessment that describes the specific activities, the EFH and managed species affected by those activities, and the nature of those effects. Although a programmatic EFH Assessment will be broader in scope and less specific than an EFH Assessment for an individual action, the essential elements of an EFH Assessment should still be addressed in as much detail as is appropriate. NMFS may work with the Federal agency in the development of the EFH Assessment.

After receiving the programmatic EFH Assessment, NMFS develops programmatic EFH conservation recommendations. NMFS may work with the Federal agency in developing these recommendations. When the EFH conservation recommendations are final, NMFS must provide them to the Federal agency in writing. NMFS may also want to include or attach the EFH Assessment to provide interested parties who may receive copies of the EFH conservation recommendations (such as the Councils), relevant information about the program. Once the action agency receives the programmatic EFH consultation recommendations, that agency must respond as required by section 305(b)(4)(B) of the Magnuson-Stevens Act.

### EFH Affected

For some programs it may be possible to specify the affected EFH, e.g., in U.S. Forest Service forest plans. For other programs, particularly funding programs, it may not be possible to

identify specific locations of affected EFH. In the latter case, the most appropriate approach may be to describe the scope of the program with respect to the scope of EFH, and develop a table that correlates program activities to EFH amendments, such as the example below. Other approaches may be more appropriate depending on the information available.

Example - EFH affected by Funding Program XXZZ

Council/species	Subtidal vegetated	Subtidal unvegetated	Intertidal vegetated	Intertidal unvegetated	Intertidal or subtidal shellfish beds
Council 1 - species or plan 1	X	X	X		
species or plan 2	X				X
Council 2 - species or plan 1	X	X	X	X	

### Effects on EFH

Depending on the nature of the program (a specific land management plan vs a funding program), effects on EFH may be difficult to quantify at a programmatic level. At a minimum, effects on EFH should be described generally and the following information included: number of actions (actual or estimated); range of impact size; type of impacts, both direct and indirect; and any mandatory mitigation measures. If available, additional information should be included on the following: cumulative effects of the program; cumulative (of program and non-program) effects within watersheds; and effects on fish populations.

### EFH Conservation Recommendations

Programmatic EFH conservation recommendations should be developed for as many identified adverse impacts as possible. Monitoring may also be considered a conservation recommendation. Some examples of programmatic EFH conservation recommendations follow:

- For adverse impacts (shading) of docks and piers: minimum board spacing and height above MLW.
- For adverse impacts (fish passage and hydrology) of culverts: minimum size with respect to flow, use of bottomless arcs wherever possible.
- For adverse effects (turbidity and loss of benthic organisms) of dredging: time-of-year restrictions; avoidance of SAV and shellfish beds; post-dredging restoration of gravel

spawning beds and other provisions in the 1996 NMFS National Gravel Extraction Policy.

- For adverse effects of logging (changes in turbidity, temperature, dissolved oxygen): buffer zones along anadromous fish streams.

Many Federal programs already include habitat conservation measures, in some cases developed in cooperation with NMFS. If the Federal agency already implements habitat conservation measures as part of the program, NMFS may adopt these measures as EFH conservation recommendations (in which case they should be specifically listed as EFH conservation recommendations). Programmatic EFH conservation recommendations may be characterized as requiring revision or augmentation during an individual consultation, if certain thresholds are exceeded (i.e., above a certain acreage, in certain habitats).

## Outcomes

There are five potential outcomes of a programmatic consultation:

- programmatic conservation recommendations that cover all program actions
- programmatic conservation recommendations that cover program actions, but individual consultation also required for some or all actions
- a determination that no programmatic EFH recommendations can be developed and all program actions will require individual consultation
- a determination that all program actions qualify for a General Concurrence
- a determination that although it initially appeared that there may be an adverse effect on EFH, additional assessment showed that there is no adverse effect and therefore no consultation is needed

Since programmatic consultations will often cover a number of types of activities, any combination of these outcomes may result from a programmatic consultation.

If site- or project-specific information is required to adequately address adverse impacts, the programmatic consultation may end with the conclusion that individual consultations are needed for some or all of the Federal actions in the program. If existing processes may be used to accomplish the individual consultations, NMFS should work with the Federal action agency to develop a “finding” (see section on Use of Existing Processes”). If any of the actions in the program have minimal effects, both individually and cumulatively, a General Concurrence should be developed for those actions. If it is determined that no adverse effect will occur, the programmatic consultation should state that conclusion. To comply with the MSFCMA, the conclusions reached as a result of a programmatic consultation must be documented, even if no programmatic EFH conservation recommendations are developed.

## Contents

The document containing NMFS EFH conservation recommendations for a programmatic consultation should contain:

- a description of the program
- a description of the EFH affected by program activities
- a description of the adverse effects on EFH
- programmatic EFH conservation recommendations
- how the EFH conservation recommendations will address adverse effects
- any additional consultation required of the agency, e.g. individual consultation for certain projects
- a concluding section or statement that clarifies that the programmatic consultation satisfies the MSFCMA consultation requirement and that the agency must respond to the EFH conservation recommendations within 30 days as per the MSFCMA
- the signature of the appropriate NMFS person, which could be regional or headquarters staff, depending on the level at which the consultation was done.

The description of the program, affected EFH, and adverse effects on EFH should be addressed by the action agency's programmatic EFH Assessment. The NMFS document containing the EFH conservation recommendations should briefly summarize the EFH Assessment, and may contain the entire EFH Assessment as an attachment. The programmatic consultation may contain other attachments such as a General Concurrence or a finding, if they were developed as a result of the programmatic consultation.

### Agency Response

As required by section 305(b)(4)(b) of the MSFCMA, the action agency must respond within 30 days once the programmatic EFH conservation recommendations are received. If the action agency adopts the NMFS EFH conservation recommendations as a requirement of the program, no further EFH consultation is required (except for those cases identified in the consultation document where individual consultation has been specified).

If the action agency does not adopt the programmatic EFH conservation recommendations as a requirement of their program, one of two options may be pursued: the agency and NMFS may conduct an individual EFH consultation on each of the program actions; or the agency may agree to consider adopting the programmatic conservation recommendations on a case-by-case basis. If the agency decides on a case-by-case basis whether or not to implement the EFH conservation recommendations, NMFS may include as an EFH conservation recommendations that any time the agency does not implement one of the programmatic EFH consultation recommendations for a specific project, that agency should conduct an individual EFH consultation. This would allow NMFS the opportunity to propose alternative EFH conservation recommendations when the programmatic recommendations are not implemented. Alternatively, if individual EFH consultation probably would not result in EFH conservation recommendations that are different

from those made programmatically, NMFS may simply require the action agency to provide NMFS with a response letter for each of the program actions. This response letter would indicate whether or not the programmatic EFH conservation recommendations were being implemented for individual program actions.

### Changes, Tracking, and Review

The action agency should be advised to contact NMFS if the program changes, so that the conservation recommendations can be revised as necessary. NMFS should contact the action agency if new information becomes available or if environmental conditions change such that revised or additional EFH conservation recommendations are needed. Even if an agency does not agree to reinitiate consultation in light of changes or new information, NMFS must provide additional EFH conservation recommendations, to which the agency must respond, if NMFS determines that there would be an adverse effect on EFH.

The action agency should send NMFS a report (generally annually, but other time periods may also be appropriate) listing actions authorized under the program. The format and schedule of the report should be specified in the consultation document.

NMFS should review all programmatic EFH conservation recommendations periodically, at least once every five years, to ensure that they are based on the best scientific information. NMFS may want to set an expiration date of five years or less for a programmatic consultation to ensure that it is reviewed and that the EFH conservation recommendations are reevaluated. NMFS should also review all programmatic consultations if EFH designations are changed in areas where activities covered by the programmatic consultation occur.

## 4.0 EFH General Concurrences

### Background

Section 305(b)(2) of the MSFCMA requires each Federal agency to consult with the Secretary of Commerce regarding any action or proposed action authorized, funded, or undertaken by the agency that may adversely affect EFH. The General Concurrence process is used to identify specific types of Federal actions that may adversely affect EFH, but for which no further consultation is generally required because the NMFS has determined that the identified types of actions will likely result in no more than minimal adverse effects to EFH individually and/or cumulatively. The development of General Concurrences must adhere to specific regulatory criteria, which are codified at 50 CFR 600.920(f).

General Concurrences may be developed at either the national or regional level. They should be used for categories of Federal actions that are similar in nature and similar in their impact on EFH, and that will not cause greater than minimal impacts on EFH, either individually or cumulatively. A General Concurrence is comparable to a categorical exclusion under the National Environmental Policy Act in that it dispenses with the need for more formal environmental review for identified types of actions with minimal effect that can be evaluated as a group and for which NMFS can conclude, based on an evaluation of potential effects to EFH, that case-by-case consultation is not necessary. Actions that qualify for a General Concurrence would not cause more than minimal adverse effects to EFH, and therefore do not require NMFS to develop separate EFH conservation recommendations for individual actions pursuant to Section 305(b)(4) of the Magnuson-Stevens Act. However, EFH conservation recommendations may be provided as part of the General Concurrences in cases where actions would normally cause more than minimal effect but, if modified, e.g. a seasonal restriction, would not cause more than a minimal effect. All General Concurrences must include a tracking provision to ensure that cumulative adverse effects on EFH are no more than minimal.

### Process for Developing General Concurrences

A Federal agency may request that NMFS develop a General Concurrence for specific types of agency actions, or NMFS may develop a General Concurrence on its own initiative. If a Federal agency requests a General Concurrence, the agency should provide NMFS with a written description of the nature and approximate number of the proposed actions, an analysis of the effects of the actions on EFH, including cumulative effects, and the Federal agency's conclusions regarding the magnitude of such effects.

Whether the development of a General Concurrence is initiated by another Federal agency or by NMFS, early coordination between NMFS and the action agency will help to ensure that the General Concurrence addresses appropriate types of actions and contains workable conditions. NMFS personnel should work with the action agency to identify candidate activity categories for

General Concurrences and to develop suitable bounds or thresholds that enable NMFS to differentiate minimal impact actions from actions that warrant more detailed EFH consultation.

If NMFS determines that a category of actions meets the criteria in 50 CFR 600.920(f)(2), NMFS must consult with the appropriate fishery management council(s) before providing a General Concurrence to the Federal agency. Before making a final decision on a General Concurrence, NMFS must provide an opportunity for public review of the proposed General Concurrence either through the appropriate council(s) or other appropriate method. If NMFS determines that the actions proposed by a Federal agency do not meet the regulatory criteria for a General Concurrence, NMFS should notify the Federal agency in writing that a General Concurrence will not be issued and that EFH consultation may be required for each action individually. Such individual consultations may use existing environmental review procedures (rather than the procedures for abbreviated and expanded consultation described in 50 CFR 600.920(h) and (i)), if NMFS has issued a finding that such processes are sufficient to address the EFH consultation requirements. Another option for handling consultations may be use of a programmatic consultation.

### Criteria for General Concurrences

NMFS must determine that the actions to be covered by a General Concurrence meet these three criteria: (A) The actions must be similar in nature and similar in their impact on EFH; (B) The actions must not cause greater than minimal adverse effects on EFH when implemented individually; and (C) The actions must not cause greater than minimal cumulative adverse effects on EFH. The following guidelines should be used by NMFS personnel to determine whether proposed actions meet the criteria for a General Concurrence:

- Actions considered “similar in nature” will typically be activities of a common type, size, and purpose, such as the construction of boat docks of certain dimensions.
- Actions that are “similar in their impact on EFH” should result in physical, chemical, and/or biological effects of a common extent and duration.
- Actions that would cause “minimal adverse effects on EFH when implemented individually” should be of such limited effect on EFH that conservation recommendations are generally not necessary to ensure that the quality and quantity of EFH are not diminished.
- Actions that do not “cause greater than minimal cumulative adverse effects on EFH” should not cause incremental impacts that would result in a substantive reduction in the quality and quantity of EFH when considered collectively.

NMFS may also determine that certain categories of Federal actions meet the criteria in 50 CFR 600.920(f)(2) contingent upon project size limitations, seasonal restrictions, or other conditions

necessary to ensure that the effects on EFH are minimal individually and cumulatively. In such cases, these conditions must be stated explicitly in the General Concurrence.

If NMFS is considering the development of a General Concurrence for actions affecting a Habitat Area of Particular Concern, NMFS personnel should apply a higher level of scrutiny to determine whether the actions may cause greater than minimal adverse effects on EFH individually and/or cumulatively.

NMFS may include a “kick-out” provision in a General Concurrence that would require notification of NMFS for actions that may result in more than minimal impact, and for which further consultation may be required.

### Format of General Concurrences

A General Concurrence must be a written document, signed by the appropriate NMFS official, that specifically identifies the Federal actions covered by the General Concurrence and includes NMFS’ determination that the types of actions covered by the General Concurrence meet the applicable regulatory criteria; therefore, further consultation for individual actions covered by the General Concurrence is not required. Typically the General Concurrence will take the form of a letter from the NMFS Regional Administrator to the appropriate official in another Federal agency.

General Concurrences should include the following information: a description of the types of actions covered; the approximate number, e.g., annually, of individual actions that would occur; a list of the specific actions (if known); the species and life stages for which EFH may be affected; a conclusion that the actions meet the criteria in 50 CFR 600.920(f)(2); and any applicable requirements for notifying NMFS of individual actions or pursuing further consultation pursuant to 50 CFR 600.920(f)(4). If a General Concurrence includes a requirement for the Federal agency to notify NMFS of individual actions, the General Concurrence should state that after receiving such notification, NMFS may require further consultation on a case-by-case basis and/or may provide additional EFH conservation recommendations to the agency, if warranted. Finally, each General Concurrence should include a statement that NMFS will periodically review its findings of General Concurrence and may revise or revoke a General Concurrence if new information indicates that the covered actions are having more than minimal adverse effects on EFH. The General Concurrence should state that NMFS will notify the Federal agency as early as possible if any such modifications become necessary. The General Concurrence must include a statement regarding how actions qualifying for the General Concurrence will be tracked.



## Tracking, Changes, and Review

Actions qualifying for a General Concurrence must be tracked to ensure that their cumulative effects are no more than minimal. In most cases, tracking should be the responsibility of the Federal action agency because the information is most readily available to that agency. However, NMFS may agree to track actions covered by a General Concurrence if the General Concurrence includes a requirement for the agency to notify NMFS of individual actions. Tracking should include a tally of the number of actions, amount of habitat adversely affected, type of habitat adversely affected, and the baseline against which an assessment of cumulative impacts can be made. The agency responsible for tracking such actions should make the information available to NMFS, the affected Council(s), and the public on an annual basis; the process for doing so should be included in the General Concurrence.

NMFS should contact the action agency if new information becomes available or if environmental conditions change such that the covered actions are having more than minimal adverse effects on EFH. NMFS should review all each General Concurrences periodically, at least once every five years, to ensure that they are up to date. NMFS may want to set an expiration date of five years or less for a General Concurrence to ensure that it is reviewed and that the effects on EFH are reevaluated. NMFS should also review all General Concurrences if new EFH is designated in areas where General Concurrence activities occur.

## 5.0 Coordination with Fishery Management Councils

The EFH regulations direct the Councils and NMFS to cooperate as closely as possible to identify actions that may adversely affect EFH, to develop comments and EFH conservation recommendations to Federal and state agencies, and to provide EFH information to Federal or state agencies. NMFS is further directed to develop agreements with each Council to facilitate sharing information on actions that may adversely affect EFH and in coordinating Council and NMFS comments and recommendations on those actions (50 CFR 600.905(c)). Throughout the EFH regulations, NMFS is required to coordinate with the Councils for specific actions such as: sending the appropriate Council a copy of NMFS EFH conservation recommendations (600.920(h)(4)), coordinating with the Council on site visits (600.920(i)(3)), coordinating with the Council before issuing a General Concurrence (600.920 (f)(3)), and in requesting further review of a Federal decision if it is contrary to Council EFH conservation recommendations (600.920(j)(2)).

Each NMFS region must develop written agreements with the appropriate Councils <sup>3</sup> to accomplish the required coordination with the Councils. These written agreements should address the following topics:

- 1) How NMFS and the Council will share information on EFH conservation recommendations when a Council is commenting on an agency action;
- 2) How NMFS will coordinate review by the Council of proposed General Concurrences (this review should be documented);
- 3) How NMFS will coordinate with the Councils on site visits for projects requiring expanded consultation;
- 4) How NMFS will provide copies to the Councils of EFH conservation recommendations; and
- 5) How the Council will make a request that the NMFS Assistant Administrator initiate further review of Federal agency decisions that are inconsistent with Council EFH conservation recommendations.

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<sup>3</sup>NMFS regions should coordinate with Councils outside the immediate area to identify EFH described for interjurisdictional fisheries.

## **6.0 EFH Conservation Recommendations to State Agencies**

State agencies are not required to consult with NMFS or the Councils on state actions that may adversely affect EFH. However, NMFS is required to provide EFH conservation recommendations on any Federal or state action that would adversely affect EFH.

Each NMFS Region should use existing coordination procedures under statutes such as the Coastal Zone Management Act or establish new procedures to identify state actions that may adversely affect EFH, and for determining the most appropriate method for providing EFH conservation recommendations to the state agency.

When an action that would adversely affect EFH requires authorization or funding by both Federal and state agencies, NMFS will provide the appropriate state agencies with copies of EFH conservation recommendations developed as part of the Federal consultation procedures. NMFS will also seek agreements on sharing information and EFH conservation recommendations with Federal or state agencies conducting similar consultation and recommendation processes, e.g., review by a state fish and wildlife agency, to ensure coordination of these efforts.

## **Appendix 1 - Statutory and Regulatory Language**

### **Statutory Language for EFH Consultation with Federal Agencies**

16 U.S.C. 1855(b) (section 305(b) MSFCMA)

(2) Each Federal agency shall consult with the Secretary with respect to any action authorized, funded, or undertaken, or proposed to be authorized, funded, or undertaken, by such agency that may adversely affect any essential fish habitat identified under this Act.

(4)(A) If the Secretary receives information from a Council or Federal or State agency or determines from other sources that an action authorized, funded, or undertaken, or proposed to be authorized, funded, or undertaken, by any Federal or state agency would adversely affect any essential fish habitat identified under this Act, the Secretary shall recommend to such agency measures that can be undertaken by such agency to conserve such habitat.

(4)(B) Within 30 days after receiving a recommendation under subparagraph (A), a Federal agency shall provide a detailed response in writing to any Council commenting under paragraph (3) and the Secretary regarding the matter. The response shall include a description of the measures proposed by the agency for avoiding, mitigating, or offsetting the impact of the activity on such habitat. In the case of a response that is inconsistent with the recommendations of the Secretary, the Federal agency shall explain its reasons for not following the recommendations.

### **Regulations for Consultation in General**

50 CFR § 600.920 Federal agency consultation with the Secretary.

(a) Consultation generally--(1) Actions requiring consultation. Pursuant to section 305(b)(2) of the Magnuson-Stevens Act, Federal agencies must consult with NMFS regarding any of their actions authorized, funded, or undertaken, or proposed to be authorized, funded, or undertaken that may adversely affect EFH. EFH consultation is not required for completed actions, e.g., issued permits. Consultation is required for renewals, reviews, or substantial revisions of actions. Consultation on Federal programs delegated to non-Federal entities is required at the time of delegation, review, and renewal of the delegation. EFH consultation is required for any Federal funding of actions that may adversely affect EFH. NMFS and Federal agencies responsible for funding actions that may adversely affect EFH should consult on a programmatic level, if appropriate, with respect to these actions.

### **Regulations for Use of Existing Procedures**

50 CFR § 600.920

(e) Use of existing consultation/environmental review procedures--(1) Criteria. Consultation and commenting under sections 305(b)(2) and 305(b)(4) of the Magnuson-Stevens Act should be

consolidated, where appropriate, with interagency consultation, coordination, and environmental review procedures required by other statutes, such as the National Environmental Policy Act (NEPA), Fish and Wildlife Coordination Act, Clean Water Act, Endangered Species Act (ESA), and Federal Power Act. The consultation requirements of section 305(b)(2) of the Magnuson-Stevens Act can be satisfied using existing or modified procedures required by other statutes if such processes meet the following criteria:

(i) The existing process must provide NMFS with timely notification of actions that may adversely affect EFH. The Federal action agency should notify NMFS according to the same timeframes for notification (or for public comment) as in the existing process. However, NMFS should have at least 60 days notice prior to a final decision on an action, or at least 90 days if the action would result in substantial adverse impacts. NMFS and the action agency may agree to use shorter timeframes if they allow sufficient time for NMFS to develop EFH conservation recommendations.

(ii) Notification must include an assessment of the impacts of the proposed action on EFH that meets the requirements for EFH Assessments contained in paragraph (g) of this section. If the EFH Assessment is contained in another document, that section of the document must be clearly identified as the EFH Assessment.

(iii) NMFS must have made a finding pursuant to paragraph (e)(3) of this section that the existing process satisfies the requirements of section 305(b)(2) of the Magnuson-Stevens Act.

(2) EFH conservation recommendation requirements. If an existing consultation process is used to fulfill the EFH consultation requirements, then the comment deadline for that process should apply to the submittal of NMFS conservation recommendations under section 305(b)(4)(A) of the Magnuson-Stevens Act, unless a different deadline is agreed to by NMFS and the Federal agency. The Federal agency must respond to these recommendations within 30 days pursuant to section 305(b)(4)(B) of the Magnuson-Stevens Act. NMFS may request the further review of any Federal agency decision that is inconsistent with a NMFS EFH recommendation, in accordance with paragraph (j)(2) of this section. If NMFS EFH conservation recommendations are combined with other NMFS or NOAA comments on a Federal action, such as NOAA comments on a draft Environmental Impact Statement, the EFH conservation recommendations shall be clearly identified as such (e.g., a section in the comment letter entitled "EFH conservation recommendations") and a response pursuant to section 305(b)(4)(B) of the Magnuson-Stevens Act is required for only the identified portion of the comments.

(3) NMFS finding. A Federal agency with an existing consultation process should contact NMFS at the appropriate level (regional offices for regional processes, headquarters office for national processes) to discuss how the existing process, with or without modifications, can be used to satisfy the EFH consultation requirements. If, at the conclusion of these discussions, NMFS determines that the existing process meets the criteria of paragraph (e)(1) of this section, NMFS will make a finding that the existing or modified process can satisfy the EFH consultation requirements of the Magnuson-Stevens Act. If NMFS does not make such a finding, or if there are no existing consultation processes relevant to the Federal agency's actions, the action agency and NMFS should follow the consultation process in the following sections.

## Regulations for Programmatic Consultations

50 CFR § 600.920

(2) Appropriate level of consultation.

(i) NMFS and other Federal agencies may conduct consultation at either a programmatic or project-specific level. Federal actions may be evaluated at a programmatic level if sufficient information is available to develop EFH conservation recommendations and address all reasonably foreseeable adverse effects to EFH. Project-specific consultations are more appropriate when critical decisions are made at the project implementation stage, or when sufficiently detailed information for the development of EFH conservation recommendations does not exist at the programmatic level.

(ii) If, after a Federal agency requests programmatic consultation, NMFS determines that all concerns about adverse effects on EFH can be addressed at a programmatic level, NMFS will develop EFH conservation recommendations that cover all projects implemented under that program, and no further EFH consultation will be required. Alternatively, NMFS may determine that project-specific consultation is needed for part or all of the program's activities, in which case NMFS may develop some EFH conservation recommendations at a programmatic level, but will also recommend that project-specific consultation will be needed to complete the EFH consultation requirements. NMFS may also determine that programmatic consultation is not appropriate, in which case all EFH conservation recommendations will be deferred to project-specific consultations.

## Regulations for General Concurrences

50 CFR § 600.920

(f) General Concurrence--(1) Purpose. The General Concurrence process identifies specific types of Federal actions that may adversely affect EFH, but for which no further consultation is generally required because NMFS has determined, through an analysis of that type of action, that it will likely result in no more than minimal adverse effects individually and cumulatively. General Concurrences may be national or regional in scope.

(2) Criteria. (I) For Federal actions to qualify for General Concurrence, NMFS must determine, after consultation with the appropriate Council(s), that the actions meet all of the following criteria:

(A) The actions must be similar in nature and similar in their impact on EFH.

(B) The actions must not cause greater than minimal adverse effects on EFH when implemented individually.

(C) The actions must not cause greater than minimal cumulative adverse effects on EFH.

(ii) Actions qualifying for General Concurrence must be tracked to ensure that their cumulative effects are no more than minimal. In most cases, tracking will be the responsibility of the Federal action agency, but NMFS also may agree to track actions for which General Concurrence has been authorized. Tracking should include numbers of actions, amount of habitat adversely affected, type of habitat adversely affected, and the baseline against which the action

will be tracked. The agency responsible for tracking such actions should make the information available to NMFS, the Councils, and to the public on an annual basis.

(iii) Categories of Federal actions may also qualify for General Concurrence if they are modified by appropriate conditions that ensure the actions will meet the criteria in paragraph (f)(2)(I) of this section. For example, NMFS may provide General Concurrence for additional actions contingent upon project size limitations, seasonal restrictions, or other conditions.

(iv) If a General Concurrence is developed for actions affecting habitat areas of particular concern, the General Concurrence should be subject to a higher level of scrutiny than a General Concurrence not involving a habitat area of particular concern.

(3) General Concurrence development. A Federal agency may request a General Concurrence for a category of its actions by providing NMFS with a written description of the nature and approximate number of the proposed actions, an analysis of the effects of the actions on EFH and associated species and their life history stages, including cumulative effects, and the Federal agency's conclusions regarding the magnitude of such effects. If NMFS agrees that the actions fit the criteria in paragraph (f)(2) of this section, NMFS, after consultation with the appropriate Council(s), will provide the Federal agency with a written statement of General Concurrence that further consultation is not required, and that preparation of EFH Assessments for individual actions subject to the General Concurrence is not necessary. If NMFS does not agree that the actions fit the criteria in paragraph (f)(2) of this section, NMFS will notify the Federal agency that a General Concurrence will not be issued and that abbreviated or expanded consultation will be required. If NMFS identifies specific types of Federal actions that may meet the requirements for a General Concurrence, NMFS may initiate and complete a General Concurrence.

(4) Notification and further consultation. NMFS may request notification for actions covered under a General Concurrence if NMFS concludes there are circumstances under which such actions could result in more than a minimal impact on EFH, or if it determines that there is not a process in place to adequately assess the cumulative impacts of actions covered under the General Concurrence. NMFS may require further consultation for these actions on a case-by case basis. Each General Concurrence should establish specific procedures for further consultation, if appropriate.

(5) Public review. Prior to providing any Federal agency with a written statement of General Concurrence for a category of Federal actions, NMFS will provide an opportunity for public review through the appropriate Council(s), or other reasonable opportunity for public review.

(6) Revisions. NMFS will periodically review and revise its findings of General Concurrence, as appropriate.

## **Appendix 2 - Examples of EFH Documents**

Example of a Finding for NEPA

Example of a Finding for FWCA/CWA/RHA

Example of Language Indicating That NMFS Cannot Make a Finding

Example of Response to a Request For Concurrence

Example of an Interim Response Letter

Example of a Programmatic Consultation on a Forest Plan

Example of a Request for a General Concurrence

Example of a General Concurrence for Corps Projects

Example of a General Concurrence for Corps Permits



## EXAMPLE OF A FINDING FOR NEPA

General xxxx  
U.S. Army Corps of Engineers  
North Atlantic Division  
New York, NY

Dear General xxxx:

The Magnuson-Stevens Fishery Conservation and Management Act (MSFCMA) requires Federal agencies such as the Army Corps of Engineers (ACOE) to consult with the Secretary of Commerce regarding any action or proposed action authorized, funded, or undertaken by the agency that may adversely affect Essential Fish Habitat (EFH) identified under the Act. The first designations of EFH will become effective in March 1999 after they are approved by the Secretary. National Marine Fisheries Service (NMFS) personnel have discussed the new EFH requirements with your staff and both agencies have agreed to use the National Environmental Policy Act (NEPA) process to carry out EFH consultations for ACOE civil works projects throughout the North Atlantic Division as described below.

The EFH regulations, 50 CFR Section 600.920(e)(3), enable Federal agencies to use existing consultation/environmental review procedures to satisfy the MSFCMA consultation requirements if the existing procedures meet the following criteria: 1) the existing process must provide NMFS with timely notification of actions that may adversely affect EFH (600.920(e)(i)); 2) notification must include an assessment of impacts of the proposed action (600.920(g)); and, 3) NMFS must have made a finding pursuant to section 600.920(e)(3) that the existing process satisfies the requirements of section 305(b)(2) of the MSFCMA.

NMFS finds that the NEPA process used by the ACOE North Atlantic Division for civil works projects (navigation, shoreline stabilization, environmental remediation, flood control, etc.) may be used to satisfy the consultation requirements of the MSFCMA provided the ACOE and NMFS adhere to the following steps:

### **1. Notification**

The ACOE will provide NMFS with timely notification of actions that may adversely affect EFH. Wherever possible, NMFS should have at least 60 days notice prior to a final decision on an action, or at least 90 days if the action would result in a substantial adverse impact to EFH. These time frames will allow NMFS to develop EFH conservation recommendations.

Although NMFS and the ACOE typically coordinate early in the project planning, notification for the purposes of the EFH consultation will usually occur when NMFS receives a draft Environmental Impact Statement (EIS) or Environmental Assessment (EA). This notification

must clearly state that the ACOE is initiating EFH consultation, and it must be accompanied by an EFH Assessment. In order for the EA process to serve as the EFH consultation, ACOE must provide NMFS a draft EA and delay signing a Finding of No Significant Impact until after the agency responds to NMFS' EFH recommendations.

## **2. EFH Assessment**

The draft NEPA document will include an assessment of the impacts of the proposed action on EFH in a chapter or section titled "EFH" or something similar enough to be easily identified within the document.

The EFH assessment will include 1) a description of the proposed action; 2) an analysis of individual and cumulative effects of the action on EFH, the managed species, and associated species such as major prey species, including affected life history stages; 3) the ACOE's views regarding effects on EFH; and, 4) a discussion of proposed mitigation, if applicable.

The draft NEPA document may incorporate such information by reference to another EFH Assessment prepared for a similar action, supplemented with any relevant new project-specific information, provided that the proposed action involves similar impacts to EFH in the same geographic area or a similar ecological setting. It may also incorporate by reference other relevant assessment documents. These documents will be provided to NMFS with the draft EIS or EA.

In cases where there is an existing NEPA document for a civil works project, an EFH consultation should be completed prior to a new action such as maintenance dredging of a Federal navigation project. At that time, the EFH consultation can be accomplished through the development of a supplemental EIS or EA.

## **3. NMFS EFH conservation recommendations**

Upon review of the draft EIS or EA, NMFS will develop EFH conservation recommendations as part of its comments on the draft NEPA document, in a separate section of the NMFS comment letter titled "EFH Conservation Recommendations." NMFS will provide its recommendations during the established comment period under NEPA.

## **4. ACOE Response**

Under section 305(b)(4)(B) of the MSFCMA, the ACOE has a statutory requirement to provide a written response to NMFS within 30 days after receiving the NMFS EFH Conservation Recommendations. If the ACOE is not able to respond fully within 30 days, the ACOE may send a preliminary response stating that they have received NMFS recommendations, will consider them fully, have not yet made a decision on the project, but will respond to NMFS

recommendations in detail, in a letter or within the final EIS or EA. The ACOE then must respond to the recommendations by letter or within the final EIS or EA in a section or chapter clearly labeled as such. The ACOE response must be provided to NMFS at least 10 days before the ACOE signs a Finding of No Significant Impact or a Record of Decision, to allow time for dispute resolution if necessary.

The ACOE response must include a description of measures proposed by the ACOE for avoiding, mitigating, or offsetting the impact of the activity on EFH, as required by section 305(b)(4)(B) of the MSFCMA and 50 CFR 600.920(j). In the case of a response that is inconsistent with NMFS conservation recommendations, the ACOE must explain its reasons for not following the recommendations, including the scientific justification for any disagreements with NMFS over the anticipated effects of the action or the measures needed to avoid, minimize, mitigate, or offset such effects.

## **5. Dispute Resolution**

If an ACOE decision is inconsistent with NMFS EFH conservation recommendations, NMFS will endeavor to resolve any such issues at the field level wherever possible, typically in a meeting between the NMFS Regional Administrator and the ACOE District Engineer. However, 50 CFR 600.920(j)(2) allows the NOAA Assistant Administrator for Fisheries to request a meeting with an ACOE headquarters official to discuss the proposed action and opportunities for resolving any disagreements.

## **Conclusion**

If you agree with the procedures described in this finding, please indicate your agreement in writing.

If you have any questions on this matter, please contact xxxx for assistance.

Sincerely,

Regional Administrator

## EXAMPLE OF A FINDING FOR FWCA/CWA/RHA

Mr.  
Chief, Regulatory Division  
U.S. Army, Corps of Engineers  
20 Mass. Ave., N.W.  
Washington D.C. 20314

Dear Mr.     :

The purpose of this letter is to document discussions between staff in the National Marine Fisheries Service (NMFS) and Army Corps of Engineers (ACOE) regarding NMFS making a “finding” that the individual permit public notice (IP) process used by the ACOE to permit projects under section 404 of the Clean Water Act, section 10 of the Rivers and Harbors Act, and section 103 of the Marine Protection Research and Sanctuaries Act can be used to satisfy the consultation requirements of the Magnuson-Stevens Fishery Conservation and Management Act (MSFCMA). The provisions for such a finding are found in the essential fish habitat (EFH) regulations (50 CFR 600.905).

Section 600.920(e)(3) states that EFH consultation may be consolidated with existing interagency consultation procedures if: 1) the existing process provides NMFS with timely notification of actions that may adversely affect EFH; 2) notification includes an assessment of impacts of the proposed action as discussed in section 600.920 (g); and, 3) NMFS has made a finding pursuant to section 600.920(e)(3) that the existing process satisfies the requirements of section 305(b)(2) of the MSFCMA.

With respect to the first criterion above, ACOE’s IP process for authorizing projects in jurisdictional waters provides the NMFS with timely notification in that a public notice is generally provided at least 60 days before the ACOE’s final decision on the project. With respect to the second criterion, the Corps public notices generally do not include an assessment of the effects of the proposed action on fish habitat. However, in discussions with NMFS staff, the ACOE has agreed to implement at the District level the process described below. This process will allow EFH assessments to be incorporated into ACOE public notices, or into other decision documents, as appropriate.

### **Incorporation of EFH Consultation into Corps Individual Permit Process**

At the District and Regional level, NMFS and ACOE staff meet to develop a regional finding. As part of developing that finding, NMFS and ACOE discuss the information needs for EFH consultation and the types of projects that might require expanded consultation. The essential fish habitat (EFH) regulations state that expanded consultation must be used for projects that would result in substantial adverse effects to EFH (50 CFR 600.920(i)). For any particular project,

ACOE should make a determination of whether abbreviated or expanded consultation is appropriate. However, if NMFS believes that expanded consultation is required for a particular project, NMFS should inform the Corps of this conclusion at the earliest opportunity, such as in pre-application meetings.

For those projects requiring only abbreviated consultation, the ACOE public notice will include brief information on the effects of the proposed action on EFH and the ACOE's views regarding such effects, including whether or not the effects are expected to be substantial (e.g., "This project will fill 5.3 acres of tidal flats that have been described as EFH for juvenile summer flounder. Loss of this nursery habitat may adversely affect summer flounder. The District Engineer has made a preliminary determination that the adverse effect on EFH will not be substantial.")

For those projects requiring expanded consultation, the ACOE will provide NMFS with information on impacts to EFH in an EFH Assessment provided with the public notice. If appropriate, the ACOE may incorporate the EFH Assessment into a draft Environmental Assessment (EA) or draft Statement of Findings (SOF). Regardless of whether the EFH Assessment is part of a draft SOF or EA, EFH should be addressed in the final EA or SOF. The EFH Assessment will be provided to NMFS in a time frame sufficient to allow NMFS to develop EFH conservation recommendations (generally 30 days, but more or less time may be needed depending on the complexity of the project).

### **Incorporation of other MSFCMA requirements into ACOE Individual Permit Process**

Within the public notice comment period, or within 30 days of receiving an EA, SOF, or other EFH assessment, NMFS will provide EFH conservation recommendations as part or all of its comments on the public notice or other document containing the EFH assessment. The EFH conservation recommendations will be clearly labeled as such. Under section 305(b)(4)(B) of the MSFCMA, the ACOE has a statutory requirement to respond in writing within 30 days to the NMFS recommendations. If the ACOE will not make a decision within 30 days of receiving NMFS EFH Conservation Recommendations, the ACOE should provide NMFS with a letter within 30 days to that effect, and indicate when a response will be provided (e.g., we have received your recommendations, we will consider them fully, we have not yet made a decision on the project, but will respond to your recommendations fully when we have made a decision in ## days.) The ACOE will then respond in detail in the final EA, SOF, or letter to NMFS, at least 10 days before the permit decision, as required by the MSFCMA and EFH regulations. The ACOE's document will clearly label the part that contains the required response to NMFS.

### **Summary of EFH Consultation Process for ACOE Individual Permits**

- 1) **Notification** - Notification will occur when NMFS receives a public notice from the ACOE on the project. The public notice will clearly state that the ACOE is initiating EFH consultation and that an EFH Assessment is included.

**2 EFH Assessment -**

a) For those projects that require abbreviated consultation, the ACOE will put a brief EFH Assessment in the public notice (e.g., “This project will fill 5.3 acres of EFH for juvenile summer flounder. Loss of this nursery habitat may adversely affect summer flounder, but the ACOE has made a preliminary determination that the adverse effect on EFH will not be substantial.”)

b) For those projects that the ACOE determines require expanded consultation, the ACOE will provide NMFS with a detailed EFH Assessment. This Assessment may be a separate document or it may be a component of another document, as long as the EFH Assessment is clearly identified. The EFH Assessment will be provided to NMFS in a time frame sufficient to allow NMFS to develop EFH conservation recommendations (generally 30 days, but more or less time may be needed depending on the complexity of the project).

c) If, upon receiving a public notice (or in pre-application consultation), NMFS concludes that a project has the potential for substantial adverse impacts on EFH, NMFS will so inform the ACOE and request that the ACOE conduct expanded EFH consultation and provide a detailed EFH Assessment. This request may occur after ACOE initiates abbreviated EFH consultation or before any EFH consultation occurs. If a public comment period for the project has already begun, NMFS may request an extension of the comment period (under Part II. 4 of the 404(q) MOA with Army) to allow time for the ACOE to provide the EFH Assessment, and for NMFS to develop EFH conservation recommendations. If the ACOE does not agree to conduct expanded consultation, NMFS will provide EFH conservation recommendation based on whatever information has been provided.

**3) EFH Conservation Recommendations** - NMFS will provide EFH conservation recommendations as part of NMFS comments on the public notice, clearly labeled as such.

**4) Response** - The ACOE will respond to NMFS EFH conservation recommendations in either a letter or a revised SOF or EA. This response will be clearly labeled as such. The MSFCMA requires that such a response be sent within 30 days of receiving NMFS EFH recommendations. If the ACOE will not be making a decision within 30 days of receiving NMFS recommendations, the ACOE will send a preliminary response within 30 days stating that the ACOE has received NMFS EFH recommendations, will consider them fully, that the ACOE has not yet made a decision on the project, but will respond to NMFS EFH recommendations fully when a decision is made in ## days. The complete response will be sent to NMFS at least 10 days before the ACOE issues the permit.

**Finding**

With the implementation of the process described above, NMFS finds that the ACOE IP process satisfies the EFH consultation requirements of section 305(b) of the MSFCMA.

**Conclusion**

If you agree with the procedures described in this finding, please respond and indicate your agreement in writing.

Sincerely,

NMFS F/HC OD

EXAMPLE OF LANGUAGE INDICATING THAT NMFS CANNOT MAKE A FINDING

Dear Federal agency staff:

NMFS has determined that your agency's current environmental review process pursuant to **(identify the statute)** does not meet the consultation requirements of the MSFMCA and EFH regulations because **(explain reasons, such as insufficient documentation of effects, actions that are not covered by the existing process (CEs under NEPA), etc.)** Accordingly, NMFS does not concur with your conclusion that this process will adequately serve as a means to conduct EFH consultation.

We would like to discuss with you possible changes to your process that will allow us to use this existing process for EFH consultations. One approach might be to **(make a suggestion on how to modify the process to meet the MSFMCA and IFR requirements)**. We may identify other options in additional discussions. Please contact my office so we can continue **(or initiate)** efforts to develop a procedure that will allow efficient implementation of the EFH consultation requirements.

Sincerely,

NMFS staff



**EXAMPLE OF RESPONSE TO A REQUEST FOR NMFS CONCURRENCE WITH AN AGENCY'S "NO EFFECT ON EFH" DETERMINATION**

Dear Corps staff:

In your letter of March 31, 1999, you asked for NMFS's concurrence with your conclusion that the proposed Myway Highway Bypass in Tampa, Florida, will have no adverse effects on EFH. Neither the EFH consultation provisions of the Magnuson-Stevens Act nor NMFS's EFH regulations have any provisions regarding such a concurrence. Therefore, NMFS will not provide the requested concurrence. The Army Corps of Engineers (ACOE), as the lead Federal action agency, must make the initial determination of whether the action may adversely affect EFH, and then proceed with consultation if, in the ACOE's view, the project may adversely affect EFH. If the ACOE determines that the action would not adversely affect EFH, then it has no statutory obligation to consult pursuant to the Magnuson-Stevens Act EFH consultation requirements.

EXAMPLE OF A PRELIMINARY RESPONSE LETTER

Joe Fishmann  
NMFS  
Swampville, LA

Dear Mr. Fishmann:

On April 1, 1999, the National Park Service (NPS) received your EFH conservation recommendations for the Angel Bend Recreation Center. The NPS will give your recommendations full consideration as we develop the final Environmental Impact Statement (EIS) for this project. Pursuant to section 305(b)(4)(B) of the Magnuson-Stevens Fishery Conservation Management Act (MSFCMA), NPS is required to respond to your EFH conservation recommendations within 30 days of receiving them. However, the final decision on this project will not be made until all public comment has been reviewed and appropriate changes made to the document. We anticipate that will occur in December of 1999. At that time, NPS will provide the response required by the MSFCMA, in the "Response to Comments" section of the final EIS, which will be provided to you at least 10 days before the Record of Decision is signed.

Sincerely,

Mark Myword  
National Park Service

## EXAMPLE OF A PROGRAMMATIC CONSULTATION DOCUMENT ON A FOREST PLAN

*Note: Sections 1-3 were written by the Forest Service as the EFH Assessment that was sent to NMFS. The FS EFH Assessment was incorporated into this document by NMFS. Sections 4-6 were written by NMFS as the EFH conservation recommendations and other information needed to document a programmatic consultation.*

### **Essential Fish Habitat Programmatic Consultation - Hundred-Acre-Wood Forest Management Plan**

1.0 Program Description: The Hundred-Acre-Wood Forest Management Plan (HAW Plan), developed by the US Department of Agriculture, Forest Service (USFS), describes the five-year plan for management of the HAW. The essential elements of the plan are:

- Timber Harvest: 25% of the forest (25 acres) is designated as suitable timber land for harvest of oak and pine. Harvest methods may include selective harvest (thinning) or clear cuts followed by replanting. Fifty-foot no-cut buffers are proposed along all streams.
- Road construction: the proposed harvest plan will require construction of 5 miles of new dirt roads in the HAW. The roads will be approximately 20 feet wide. There are 12 stream crossings associated with these roads. Stream crossings will consist of box culverts placed on the bottom of the existing stream, temporary wooden bridges, or permanent steel bridges.
- Recreation areas: 50% (50 acres) of the forest is designated as the HAW Recreational Area. Existing hiking trails will be maintained, and primitive campsites will be established along the trails. A cross-country skiing information center and support facility is also proposed.
- Wilderness Areas: 25% (25) acres of the forest is designated as the HAW Wilderness Area. No trails or camp sites will be maintained in this area. No timber harvest will occur in this area.

#### 2.0 Essential Fish Habitat in the HAW

Based on the North Pacific Fishery Management Council (NPFMC) EFH descriptions for this area, twelve of the streams in the HAW and their associated riverine wetlands are EFH for woozelfish larvae, juveniles, and spawning adults (Figure 1). These streams and wetlands serve as spawning areas for adults and refuge areas for larval and juvenile woozelfish. In addition, the NPFMC has designated Tyre Creek as a Habitat Area of Particular Concern (HAPC) because the stream contains numerous gravel bars that support woozelfish spawning in an area where gravel bars are scarce.

### 3.0 Assessment of Effects on Essential Fish Habitat (EFH)

*Impacts associated with timber harvest* - The direct impacts of timber harvest on aquatic habitat include increased turbidity and temperature in the stream itself, and loss of the riparian habitat structures within the stream, such as large woody debris (LWD) and gravel beds. The indirect impacts of timber harvest include increased flooding. These impacts result in both the permanent loss of habitat as well as habitat degradation (Murphy, 1995). Of the 25 acres designated for timber harvest, 8 acres contain 4 streams designated as EFH (including Tyre Creek, a HAPC). If timber harvest occurs adjacent to these streams, their function as EFH could be impaired through loss of LWD, increased water temperature caused by reduced shading, and increased turbidity caused by runoff from the cleared areas. The important spawning areas in Tyre Creek could be degraded by fine sediment deposition, and possibly rendered unusable by spawning fish. The 50-foot buffers proposed along these streams will reduce the impacts of timber harvest, but measurable adverse effects are still likely.

*Impacts associated with roads and stream crossings* - Of the 12 stream crossings proposed, only two occur in EFH. However, one of those crossings (HAWRC-6) is proposed for Tyre Creek, and the other (HAWRC-8) is immediately downstream of the confluence of Tyre Creek and Sanders Stream. Although these crossings can be designed to minimize their effect on the stream bank, increased turbidity in the area of the crossing is likely to result because forest roads tend to concentrate runoff and direct it to road stream crossings.

*Effects of recreational use* - the current hiking trails cross EFH, but no adverse impacts are anticipated from their continued use. The exact location of the primitive campsites has not been specified, but even if they are located next to streams, minimal adverse effects are anticipated. The proposed cross country ski center will be located in the Sanders Stream watershed, where it could adversely affect EFH, depending on its design and exact location (details not yet developed).

*Effects of Wilderness Designation* - the 25 acres designated as the HAW Wilderness Area contain 10 streams identified as EFH. Designation as a Wilderness Area will afford considerable protection to these areas.

*Cumulative Effects* - The HAW is located in a region where timber harvest occurs in approximately 40% of the existing forest, which is predominantly privately-owned. Clear cutting along some streams in the lower part of the watershed has resulted in degraded riparian habitat for several of the streams in the county, but the adoption of minimum 25-ft no-harvest buffers along perennial streams by the Platt County Planning Board in 1992 has reduced further damage from clear cuts. Woozefish runs appear to be stable, based on annual counts over the past decade at Sable Bridge. The cumulative effect of implementation of the HAW Plan will probably be minimal in a regional context, but there could be significant localized adverse effects on streams already affected by clear cutting adjacent to the streams, and on the Tyre Stream HAPC, which

would be adversely affected by both timber harvesting and a road crossing under the proposed HAW Plan.

#### 4.0 EFH Conservation Recommendations

##### *Roads and stream crossings -*

- 1) Relocate HAWRC-6 0.5 miles north, above Tyre Creek, to avoid impacts on the HAPC.
- 2) No other roads should be constructed in the watershed of the Tyre Creek HAPC.
- 3) Construct HAWRC-8 as a temporary bridge with no structures in the stream itself, and remove it as soon as timber harvest west of the crossing is completed.

Relocation of HAWRC-6 and a prohibition on road construction in the Tyre Creek watershed will protect this important spawning area from the increased sedimentation associated with forest road construction. Construction of a temporary bridge at HAWRC-8 will minimize impacts on Sanders Stream, which provides access to Tyre Creek for migrating fish.

##### *Timber harvest -*

- 4) A 125-ft no-harvest buffer should be established along all streams identified as EFH.
- 5) A 50-ft no-harvest buffer should be established along all other streams in timber harvest area.

No-harvest buffers will protect streams against increased sedimentation and loss of riparian habitat. Research has shown that buffers greater than 100 ft are adequate to protect most riparian functions, and that buffers of 50-100 ft afford minimal protection (Johnson and Ryba, 1992).

*Recreational use* - Due to a lack of information on the specific design and location of the cross-country ski center, no EFH conservation recommendations can be provided at this time. When specific designs for the center are developed, the USFS should determine if adverse impacts on EFH may occur, and complete an individual EFH consultation with NMFS at that time. The USFS should be able to incorporate EFH consultation into USFS's existing National Environmental Policy Act (NEPA) process, as described in NMFS's February 14, 1999 finding on the use of the USFS's NEPA process to conduct EFH consultation.

#### 5.0 Conclusion:

Based on our review of the information provided by USFS on the HAW Plan and its effects on EFH, NMFS has provided the EFH conservation recommendations above regarding stream crossings and timber harvest. NMFS has also determined that one proposed project, the cross-country ski center, may require individual consultation.

As required by section 305(b) of the MSA, USFS must respond in writing within 30 days of receiving these EFH conservation recommendations. USFS must include in this response a

description of measures USFS proposes implementing to avoid, minimize, or mitigate adverse impacts on EFH. If USFS's response is inconsistent with NMFS EFH conservation recommendations, USFS must explain its reasons for not following the recommendations, including the scientific justification for any disagreements with NMFS over the anticipated effects of the proposed actions and the measures needed to avoid, minimize, mitigate, or offset such effects.

If USFS adopts the NMFS EFH conservation recommendations as management area prescriptions, no further EFH consultation is required (except in the case of the ski center, where individual consultation may be needed when design details are available). If USFS does not adopt these EFH conservation recommendations as management area prescriptions, any time a specific project will be authorized without these conservation recommendations, USFS must notify NMFS that the EFH conservation recommendations will not be implemented and explain why.

## 6.0 Revision, Tracking, and Review

If any changes are made to the HAW Plan program such that there may be different adverse effects on EFH, USFS must notify NMFS and the agencies will discuss whether the programmatic conservation recommendations should be revised. USFS will provide NMFS with an annual report of all timber harvest, bridge construction, and road construction activities undertaken under the HAW Plan. Every five years, NMFS will review these programmatic EFH conservation recommendations and determine whether they should be updated to account for new information or new technology.

Christopher Roberts  
Fishery Biologist, NMFS

## References

- Johnson, A.W. and D.M. Ryba. 1992. A literature review of recommended buffer widths to maintain various functions of stream riparian areas. King County Surface Water Management Division, Seattle, WA.
- Murphy, M.M. 1995. Forestry impacts on freshwater habitat of anadromous salmonids in the Pacific northwest and Alaska — requirements for protection and restoration. NOAA Coastal Ocean Program Decision Analysis Series No. 7, NOAA Coastal Ocean Office, Silver Spring, MD. 156 pp.

Figure 1. Map of Hundred-Acre-Wood, including proposed management areas, EFH, and HAPC

Appendix 1. Consultation History

(chronology of when the agencies met or otherwise consulted)

EXAMPLE OF A REQUEST FOR GENERAL CONCURRENCE

David Larsen  
Regional Administrator  
National Marine Fisheries Service  
Fishville, Tennessee 44444

Dear Mr. Larsen:

The Army Corps of Engineers Memphis District (ACOE-MD) requests that the National Marine Fisheries Service grant a General Concurrence to avoid the need for project-by-project Essential Fish Habitat (EFH) consultations between our agencies for a number of our Federal navigation projects. Specifically, we request a General Concurrence for routine maintenance dredging of six small Federal channels and anchorages throughout the Memphis District, as well as the repair and maintenance of breakwaters, jetties, and revetments associated with these Federal navigation projects. The six projects are:

Jackson Rock Harbor	Twelve Rocks Harbor
Dog Inlet	Pigeon Harbor
Turtle Harbor	Donut Harbor

For purposes of the General Concurrence, routine maintenance dredging would include dredging of all or portions of an authorized Federal navigation project that has been dredged within the previous 5 years. We also request that the General Concurrence cover disposal of the dredged material at the previously-used disposal site for each project. These actions are all similar in nature and in their impact on EFH. These projects and disposal locations are described on pages 35-46 of the 1997 edition of Overview of Federal Navigation Projects in the Memphis District. A copy of this document has previously been provided to your Habitat Conservation Division staff, but we will provide another copy at your request.

Based on the EFH descriptions and maps distributed by the regional fishery management council, these six projects include EFH for juvenile king flounder and adult jewel crabs. As is detailed in the attached\* report, because these six small harbors are dynamic, sandy areas that shoal quickly and have been dredged regularly for many years, we believe that continuing to maintain the harbors on a periodic basis will cause minimal impacts to flounder, crabs, and their habitat, both individually and cumulatively. *{\*note: we would expect a justification for this “minimal impact” determination that has a level of detail comparable to what’s in the FMPs}*

Thank you very much.

Sincerely,

L. Virgil Preston  
Colonel, Corps of Engineers



attachment *{this would be the analysis that justifies the “minimal impact” determination.}*

EXAMPLE OF A GENERAL CONCURRENCE  
FOR PROJECTS CONDUCTED BY THE CORPS OF ENGINEERS  
(CORRESPONDS TO THE EXAMPLE OF A REQUEST FOR A GC)  
WHERE NMFS AGREES TO DO TRACKING

Colonel L. Virgil Preston, District Engineer  
U.S. Army Corps of Engineers, Memphis District  
252 Harris Lane  
Winston, Tennessee 44444

Dear Colonel Preston:

Thank you for your March 5, 1999 request for the National Marine Fisheries Service (NMFS) to develop a General Concurrence to cover the required essential fish habitat (EFH) consultations between our agencies for certain operation and maintenance activities conducted by the Army Corps of Engineers (ACOE) for Federal navigation projects. Section 305(b) of the Magnuson-Stevens Fishery Conservation and Management Act requires an EFH consultation for any action or proposed action authorized, funded, or undertaken by a Federal agency that may adversely affect EFH. For certain types of actions that are similar in nature and impact on EFH, and will result in no more than minimal adverse effects to EFH individually and cumulatively, NMFS may issue a statement of General Concurrence and further consultation is not required. NMFS grants a General Concurrence in accordance with the requirements of 50 CFR 600.920(f) after appropriate consultation with the Federal agency, the relevant fishery management council, and the public.

You requested that NMFS provide a General Concurrence for routine maintenance dredging of ten specific Federal channels and anchorages throughout the ACOE Memphis District, as well as the repair and maintenance of breakwaters, jetties, and revetments associated with these Federal navigation projects. Routine dredging would include dredging of all or portions of an authorized Federal navigation project that has been dredged within the previous 5 years. In most cases, these are predominantly sandy channels and anchorages that shoal rather rapidly after being dredged. You also requested that the General Concurrence cover disposal of the dredged material at the previously-used disposal site for each project.

As noted in your letter, the 1997 edition of Overview of Federal Navigation Projects in the Graceland District provides the names, locations, and descriptions of each affected Federal navigation project and dredged material disposal site, including a description of the type of dredging equipment typically used for each project. Your letter also identified the species and life stages of fish and shellfish whose EFH would be affected by maintaining these projects, and concluded that the specified actions individually and cumulatively would cause minimal adverse effects to EFH and associated species.

NMFS has reviewed your request and the supporting environmental analysis that you provided. In that analysis you indicate that effects of these activities will be no more than minimal individually and cumulatively because {*summarize supporting information, which should include the specific baseline environmental conditions against which the effects are being evaluated*}. NMFS has also coordinated with the Gulf of Mexico Fishery Management Council (Council) and reviewed comments provided by the public in response to notice published by the Council in their September 1999 newsletter. Based on this information, we agree that routine maintenance of the projects you listed would normally result in no more than minimal adverse effects on EFH, either individually or cumulatively. However, to protect the EFH of spawning and juvenile king flounder, NMFS has determined that these actions only meet the criteria in 50 CFR 600.920(f)(2) and qualify for a General Concurrence if they are modified by prohibiting all dredging during the king flounder spawning and incubation season, which in most years spans the months of March, April, and May.

A recent study indicates that in years of an El Niño event, the spawning of king flounder is delayed by one to two months (Cousteau 1998). Therefore, pursuant to 50 CFR 600.920(f)(4), NMFS requests notification in advance of planned maintenance dredging of these projects so that we can determine whether modifications to the above seasonal restrictions are necessary to ensure that the actions covered under this General Concurrence will result in no more than minimal adverse effects to EFH. Such notification would also enable NMFS to track individual actions to gauge potential cumulative effects, so the ACOE would not need to track the actions separately. Upon notification of pending actions by the ACOE, NMFS may require further consultation on a case-by-case basis. If additional consultation on an action is necessary, NMFS will inform the ACOE in writing within 15 days of receiving your notification of upcoming dredging. Based on coordination with your staff, we understand that this time frame is workable from the ACOE's perspective.

NMFS will review this General Concurrence every three years and may revise or revoke it if new information indicates that the covered actions are having more than minimal adverse effects on EFH. Should any such modifications become necessary, we will notify you as early as possible. If you or your staff have any questions about this General Concurrence, please contact Alan Fergus in our Memphis field office at 999-555-8888.

Sincerely,

David Larsen  
Regional Administrator

Reference:

Cousteau, J. 1998. El Niño really messes up spawning seasons. *Flounder journal* 25:16-32.

EXAMPLE OF A GENERAL CONCURRENCE  
FOR PROJECTS PERMITTED BY THE CORPS OF ENGINEERS  
WHERE ACOE AGREES TO DO TRACKING

Colonel Elmer Foster, District Engineer  
U.S. Army Corps of Engineers, New York District  
1234 Mouse Way  
Haddocktown, New York 99999

Dear Colonel Foster:

Thank you for your March 16, 1999 request for the National Marine Fisheries Service (NMFS) to develop a General Concurrence to cover the required essential fish habitat (EFH) consultations between our agencies for certain minor construction projects authorized by the Corps of Engineers (COE) under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act. Section 305(b)(2) of the Magnuson-Stevens Fishery Conservation and Management Act requires an EFH consultation for any action, or proposed action, authorized, funded, or undertaken by a Federal agency that may adversely affect EFH. For certain types of actions that are similar in nature and impact on EFH, and will result in no more than minimal adverse effects to EFH individually and cumulatively, NMFS may issue a statement of General Concurrence that further consultation is not required. NMFS may grant a General Concurrence in accordance with the requirements of 50 CFR 600.920(f) after appropriate coordination with the Federal agency, the relevant fishery management council, and the public.

You requested that NMFS provide a General Concurrence for the following categories of activities authorized through the COE regulatory program: (1) pile-supported docks with maximum dimensions of 100 feet long and 4 feet wide, provided the deck surface is elevated at least 5 feet above any special aquatic site; (2) individual boat moorings; (3) maintenance dredging of up to 5000 cubic yards of material with upland disposal; and (4) repair and/or replacement of currently serviceable coastal structures (excluding culverts) with no expansion in size. The repair and/or replacement of culverts was excluded from the list of covered actions because individual review of these projects is necessary to determine whether it may be appropriate to increase culvert diameters to improve hydrology at existing tidal restrictions.

Your request indicated that on an annual basis, the COE New York District authorizes approximately 150 docks meeting the above specifications, 200 moorings, 40 reconstruction projects, and 75 small maintenance dredging projects with upland disposal. Based on coordination with NMFS personnel, the COE determined that projects involving these specific types of work typically cause minimal adverse effects to aquatic resources, both individually and cumulatively. Therefore, you requested that NMFS provide a General Concurrence for these activities.

NMFS has reviewed your request and the supporting environmental analysis that you provided. In this analysis you conclude that impacts of these activities will be no more than minimal because *{summarize supporting information, which should include the specific baseline environmental conditions against which the effects are being evaluated}*. NMFS has also coordinated with the New England Fishery Management Council (Council) and reviewed comments provided by the public in response to notice published by the Council in their September 1999 newsletter. Based on this information, we agree that the categories of actions you identified meet the criteria in 50 CFR 600.920(f)(2), provided that the COE tracks individual actions and submits to us an annual summary of the number and locations of projects authorized pursuant to this General Concurrence. EFH for Atlantic cod, northern halibut, and brown shrimp is located throughout the New York District and may be affected by these actions, but for the reasons explained in the analysis that accompanied your request for a General Concurrence, the effects of these actions on EFH is expected to be negligible.

NMFS requests that you provide to the Metropolis field office the information you collect as a result of tracking the actions covered by this General Concurrence. This information should be provided to NMFS by June 1 of each year and published in the Metropolis Daily News. The information provided should include the number and type of actions, as well as the amount of EFH adversely affected.

NMFS will review this General Concurrence every five years and may revise or revoke it if new information indicates that the covered actions are having more than minimal adverse effects on EFH. Should any such modifications become necessary, we will notify you as early as possible. If you or your staff have any questions about this General Concurrence, please contact Clark Kentrel in our Metropolis field office at 999-555-8888.

Sincerely,

Donald Dawson, Ph.D.  
Regional Administrator